IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 723 of 2002

in

MISC.CIVIL APPLICATIONNo 707 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KALA COOPERATIVE HOUSING SOCIETY LTD.

Versus

MANIBHAI MAGANBHAI PATEL SINCE DECD THROUGH HIS HEIRS

Appearance:

1. LETTERS PATENT APPEAL No. 723 of 2002

MR AS VAKIL for Appellant No.

UNSERVED-EXPIRED (N) for Respondent No. 1

NOTICE SERVED for Respondent No. 1/1-1/4

UNSERVED-REFUSED (N) for Respondent No. 2

MR KV SHELAT for Respondent No. 3/1-3/3

MR PREMAL JOSHI,AGP for Respondent No. 4

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE M.S.SHAH

Date of decision: 23/06/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

1. This appeal is directed against the judgment and order dated 19.8.2002 passed by the learned single judge dismissing Misc. Civil Application No. 707 of 2002 for review of the order dated 13.9.1996 dismissing Civil Application No.7038 of 1996 for default and also for review of the judgment and order dated 16.1.2002 dismissing Special Civil Application No.1735 of 1987.

2. The subject matter of the litigation is the two parcels of land which were initially owned by respondents no. 2 and 3 herein. The said respondents transferred the lands to persons who subsequently transferred the same to other parties. The present appellant claims to be the last transferee.

3. The authorities under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as 'the Act') initiated proceedings for declaring and ultimately declared the transfer of lands as void on the ground that the lands in question were fragments. The orders of the authorities came to be challenged in Special Civil Application No. 1735 of 1987 (main petition) by respondent no.1 herein which was admitted by the Court's order dated 26.8.1987. By way of ad-interim relief, the respondents were directed to maintain status quo. During pendency of the said petition, the original petitioner (respondent no.1 herein) transferred the lands to another person who in turn transferred the said lands to the present appellant. The present appellant made an application being Civil Application No.7038 of 1996 for being joined as a party respondent to the said petition being Special Civil Application No. 1735 of 1987. Since one of the respondents had expired on 13.9.1996, the appellant filed Civil Application No.7880 of 1996 for bringing on record the heirs of the deceased respondent.

It appears that in the meantime, hearing of the main petition as well as Civil Application No. 7038 of 1996 was adjourned from time to time. On 29.8.1996, the matters were adjourned to 13.9.1996. On that day, the Court dismissed Civil Application No.7038 of 1996 for

default of appearance by passing the following order:

"Rejected for default of appearance.
13.9.1996 sd/-A.N.Divecha,J."

4. It is the case of the appellant that the hearing of that application was to be adjourned to 20.9.1996 to enable the appellant to circulate Civil Application No. 7880 of1996 for orders. It is also stated that on 13.9.1996, the affidavit-in-rejoinder of the appellant (applicant in Civil Application) was also tendered. Hence, the appellant was of the bonafide belief that the main petition as well as two Civil Applications were adjourned to 20.9.1996. On 20.9.1996, the Court issued Rule on Civil Application No. 7880 of 1996 for bringing on record the heirs of the deceased respondent in Civil Application No. 7038 of 1996. It is the case of the appellant that in view of the aforesaid facts, the appellant and his Counsel were of the bonafide belief that the hearing of Civil Application No. 7038 of 1996 was also adjourned from time to time along with the main petition and Civil Application No. 7880 of 1996. However, when the main petition i.e. Special Civil Application No. 1735 of 1987 reached final hearing before the learned Single Judge on 16.1.2002, it transpired that Civil Application No.7038 of 1996 was already rejected by the Court for default of appearance on 13.9.1996 and, therefore, the learned single judge dismissed Civil Application No. 7880 of 1996 as not surviving. As far as the main petition is concerned, after hearing the learned Counsel for the petitioner as well as respondents in the said petition, the learned Single Judge dismissed the main petition.

5. The appellant herein filed Misc. Civil Application No.707 of 2002 on 28.3.2002 for the following reliefs:

"In the circumstances aforesaid, the applicant submits and prays that this Hon'ble Court be pleased to set aside:

(i) to condone the delay, if any, in making this application;

(ii) the order dated 13.9.1996 of A.N.Divecha,J. rejecting the application for default of appearance;

(iii) the order dated 16.1.2002 of R.M.Doshit,J. dismissing Civil Application No. 7880 of 1996.

(iv) the order dated 16.1.2002 of R.M.Doshit,J. dismissing the petition."

As far as prayers (i) and (ii) are concerned, the Court found that the appellant herein had not shown sufficient cause for condonation of delay of six years in respect of the prayer for recalling the order dated 13.9.1996. In view of the said finding, the Court dismissed the entire Misc. Civil Application No. 707 of 2002.

It is against the aforesaid order that the present Letters Patent Appeal is filed.

6. Mr.S.B.Vakil, learned Counsel for the appellant has submitted that the appellant as well as learned Counsel were of the bonafide belief that since Rule was already issued on Civil Application No. 7880 of 1996 for bringing on record the heirs of the deceased respondent in Civil Application No. 7038 of 1996 and hearing of the said Civil Application No. 7880 of 1996 as well as the main petition i.e. Special Civil Application No. 1735 of 1987 was being adjourned from time to time, they were not aware of the order dated 13.9.1996 rejecting Civil Application No. 7038 of 1996 for default. In fact, their case is that the hearing of the said application was to be adjourned to 20.9.1996 along with the main petition and the other application.

7. On the other hand, Mr. K.V.Shelat, learned Counsel for the respondents no. 2 and 3 and Mr. Joshi, learned AGP for the respondent no.4, have submitted that the learned Single Judge has rightly dismissed the review application on the ground of gross delay of six years. Respondent no.1, though served, has not appeared.

8. Having heard the learned Counsel for the parties, it appears to the Court that while the delay of six years would prima facie certainly appear as gross delay, when it is seen in the context of the pendency of Civil Application No. 7880 of 1996 for bringing on record the heirs of the deceased respondent in Civil Application No. 7038 of 1996 and that Civil Application No. 7880 of 1996 as well as the main petition were being notified from time to time, it cannot be said that the belief of the learned Counsel for the appellant was not bonafide. Hence, sufficient cause is shown for the delay. On this short ground alone, we are inclined to allow this appeal.

9. However, Mr. Shelat for the contesting respondents submits that no useful purpose will be served by hearing Civil Application No. 7038 of 1996 when the main petition itself has been dismissed on merits. To this argument, Mr. Vakil for the appellant has submitted that if the appellant had been joined as a party

respondent to the main petition and thereafter the main petition was heard, the result would have been different. Mr. Shelat, however, vehemently submits that the appellant having purchased the land during pendency of the petition, had no locus standi to be joined as a party respondent and that it was neither necessary nor a proper party. Mr. Vakil wanted to address us at length on this particular controversy.

10. However, we are not inclined to go into the merits of the above controversy as we are of the view that since Civil Application No. 7038 of 1996 was not heard on merits, it would be in the fitness of things if we remit the matter to the learned Single Judge for hearing Civil Application No. 7038 of 1996 on merits and if the learned Single Judge finds that the appellant was a necessary party to be joined in Special Civil Application No. 1735 of 1987, then only the learned Single Judge may consider whether the prayer for review of the order dated 16.1.2002 in Special Civil Application No. 1735 of 1987 merits any consideration. If, however, the learned Single Judge comes to the conclusion that the appellant herein was not necessary party to the main petition, the question of entertaining review application would not survive.

It is true that the question of deciding Civil Application No. 7038 of 1996 would ordinarily have survived only during pendency of the main petition, but in the peculiar facts and circumstances of the case, since the appellant did not get the opportunity of arguing Civil Application No. 7038 of 1996 on merits, we are adopting the aforesaid course.

11. We accordingly set aside the order dated 13.9.1996 rejecting Civil Application No. 7038 of 1996 for default and restore the application to file. Consequently, the order dated 16.1.2002 dismissing Civil Application No. 7880 of 1996 as not surviving is also set aside and the said application is also restored to file. We remit the matter to the learned Single Judge for hearing Civil Application No. 7038 of 1996 with Civil Application No. 7880 of 1996 on merits and only if the learned Single Judge comes to the conclusion that the appellant was a necessary party for being joined as a party respondent in Special Civil Application No. 1735 of 1987, then the learned Single Judge may further consider whether the prayer for review of the order dated 16.1.2002 in Special Civil Application No. 1735 of 1987 merits any consideration. If, however, the learned Single Judge comes to the conclusion that the appellant was not a necessary party, the question of entertaining review application would not survive. We further clarify

that while hearing and deciding Civil Application No. 7038 of 1996, the learned Single Judge will not be influenced by the order dated 16.1.2002 dismissing Special Civil Application No. 1735 of 1987. At the same time, we make it clear that we have not set aside the said order dated 16.1.2002 on merits as we have only given an opportunity to the appellant to argue Civil Application No. 7038 and 7880 of 1996 on merits.

The appeal is accordingly disposed of in terms of the aforesaid directions and observations.

12. Since the appeal is disposed of, Civil Application No. 6847 of 2002 in the LPA does not survive and accordingly stands disposed of.

(Kshitij R.Vyas,J.)

(M.S.Shah,J.)

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